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Supreme Court of the United States

October Term, 1967

No. 520

THE BROOKLYN UNION GAS COMPANY, LONG ISLAND LIGHTING COMPANY, PHILADELPHIA GAS WORKS DIVISION OF THE UNITED GAS IMPROVEMENT COMPANY AND PUBLIC SERVICE COMMISSION OF THE STATE OF NEW YORK, *Petitioners*

v.

FEDERAL POWER COMMISSION, *et al., Respondents*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION FOR RESPONDENTS AUSTRAL OIL COMPANY INCORPORATED, GULF OIL CORPORATION, HUMBLE OIL & REFINING COMPANY, PAN AMERICAN PETROLEUM CORPORATION, SUN OIL COMPANY AND TEXACO INC.

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INDEX

	Page
Table of Authorities	ii
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement	3
Reasons for Denial of the Writ	5
The Price Line Issue	5
The "Need" Issue	11
Conclusion	17

TABLE OF AUTHORITIES

Page

COURT CASES:

Atlantic Refining Company v. Public Service Commission, 360 U.S. 378 (1959) 8

Illinois Central Railroad Company v. Norfolk and Western Railway Company, ____U.S.____ (1966), 87 S. ct. 255, 17 L. ed. 2d 162 9

Pan American Petroleum Corporation v. Federal Federal Power Commission, 268 F. 2d 827 (CA10, 1959) 16

Public Service Commission of New York v. Federal Power Commission, 329 F. 2d 242 (CADC, 1964), ("Skelly" Case) 8

Public Service Commission of New York v. Federal Power Commission, 373 F. 2d 816 (CADC, 1967), ("Hawkins" Case) 9, 10, 11

Sunray DX Oil Company v. Federal Power Commission, 370 F. 2d 181 (CA10, 1966). 5, 6, 9, 10

Union Electric Co. Federal Power Commission, 326 F. 2d 535 (CA8, 1964) 16

United Gas Improvement Company v. Callery Properties, Inc., 382 U.S. 223 (1965). 8

United Gas Improvement Company v. Federal Power Commission, 283 F. 2d 817 (CA9, 1960) 8

Wisconsin v. Federal Power Commission, 373 U.S. 294 (1963). 13

COMMISSION CASES:

Amerada Petroleum Corporation, Opinion No. 422, 31 FPC 623 (1964) 5, 6

Hope Natural Gas Co., 19 FPC 405 (1958) 14

J. M. Huber Corp., Docket No. G-13800, order issued August 10, 1959 14

Kansas Pipe Line & Gas Company, et al, 2 FPC 29 (1939) 14, 16

The Ohio Oil Company, 27 FPC 551 (1962) 9

Texaco Seaboard, Inc., 29 FPC 593 (1963) 9

Transcontinental Gas Pipe Line Corporation, et al, 20 FPC 264 (1958) 15

Turnbull & Zoch Drilling Co., et al, Opinion No. 478, 34 FPC 1001 (1965) 4, 5

COMMISSION GENERAL ORDERS AND REGULATIONS:

The Commission's Regulations Under the Natural Gas Act

Section 154.103, 18 CFR 154.103 13

Section 157.14(a) 18 CFR 157.14(a) 14, 16

Section 157.25, 18 CFR 157.25 13

Order No. 334, Docket No. R-199, issued January 18, 1967 13

Order No. 334-A, Docket No. R-199, issued March 21, 1967 13

Statement of General Policy No. 61-1, 18 CFR 2.56(a), 24 FPC 818 (1960) ... 3, 5, 6, 8, 10

STATUTES:

Natural Gas Act (Act of June 21, 1938, c. 556, 52 Stat. 821 (1938), as amended, 15 U.S.C. 717-717w, as amended)

Section 7, 15 U.S.C. 717(f) 2, 13

Section 19(b), 15 U.S.C. 717r(b) 9

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No. 520

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OPINIONS BELOW

The opinion and judgment of the Court of Appeals is reported at 378 F. 2d 510, and is set out in the Appendix to the Petition in No. 520. The opinion and order of the Federal Power Commission is reported at 34 FPC 1001 (J.A. 435), rehearing denied, 34 FPC 1367 (J.A. 483).

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition in No. 520.

STATUTES INVOLVED

Pertinent provisions of Section 7 of the Natural Gas Act are set out on pages 2 and 3 of the Petition in No. 520.

QUESTIONS PRESENTED

1. Does substantial evidence support the Federal Power Commission's conclusion establishing a 16.0¢ per Mcf price line for current sales of natural gas from Texas Railroad Commission District No. 4?

2. Prior to the administrative proceedings below in which the Federal Power Commission authorized specific sales of natural gas by certain producers to several pipeline companies, the Commission had granted certificates to each of the pipeline companies authorizing the resale of such gas. In accordance with long-established precedent, the issue of the pipelines' need for the gas was considered and determined affirmatively by the Commission. In these circumstances, must the Commission reconsider the pipelines' need for such gas in the subsequent administrative proceedings in which the producers' sales to these same pipeline companies are certificated, in the absence of evidence designed to show that the Commission's previous findings of fact on that question are no longer correct?[1]

[1] Because it is not affected by Question No. 1, Austral Oil Company Incorporated joins herewith with respect to Question No. 2 only.

STATEMENT

Respondents applied for certificates of public convenience and necessity to authorize sales in interstate commerce of natural gas from Texas Railroad Commission District No. 4. These applications were consolidated with other certificate applications proposing sales from District No. 4.

At the hearing, the Examiner refused to admit Respondents' proferred evidence "concerning costs, financial and revenue requirements, geological information, supply and demand relationships, and trends and economic evidence" (J.A. 361-362). He then turned his attention to the remaining price line evidence tendered by Staff and Respondents. This evidence included a comprehensive analysis of all relevant interstate sales from the pricing area involved. Additionally, the Examiner considered the testimony of Staff and producer witnesses relating to the impact of the Commission's *Statement of General Policy No. 61-1*, 18 CFR 2.56(a), 24 FPC 818 (1960), and the amendment thereto cited *infra*.[2] Upon consideration of this evidence, the Presiding Examiner found an in-line price of 16¢ per Mcf for post-*Policy Statement* contracts.[3]

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[2] The guideline price level was set at 18¢ per Mcf for Texas Railroad Commission District No. 4, the Commission pricing area involved; this level was later reduced to 16¢ per Mcf; see *infra*.

[3] Sales under contracts executed prior to September 28, 1960, were not placed in issue by the Petition in No. 520. Only "post-*Policy Statement*" contracts, *i.e.*, contracts executed on and after September 28, 1960, the date of the Commission's *Statement of General Policy*, are under consideration here.

This finding was upheld by the Commission in its Opinion No. 478, *Turnbull & Zoch Drilling Co., et al.*, (J.A. 435 at 443-444) and by the court below (378 F. 2d 510 at 523-524).

The Respondents introduced into evidence their respective contracts with the pipeline purchasers to show proof of market (J.A. 364-365). Petitioners introduced no evidence whatsoever. The Presiding Examiner considered these contracts with the pipelines, together with the Commission's prior orders granting permanent certificates to these purchasing pipelines, and specifically found that:

> "* * * all of the pipeline purchasers of natural gas from the applicants herein have been issued permanent certificates to construct the necessary facilities required to receive and transport the natural gas. These certificates could not have been issued unless there existed in the territory proposed to be served customers who could reasonably be expected to use such natural-gas service. *Kansas Pipe Line & Gas Company, et al.*, 2 FPC 29, 45. In this proceeding, therefore, the distributor interveners want a reappraisal of whether there now exist pipeline customers who can reasonably be expected to use the natural gas which will be purchased from the producers herein. Such a reappraisal is not required by the Natural Gas Act and, in view of the proceedings in Docket R-199 referred to hereinabove, is not required in the public interest." (J.A. 366)

The Commission adopted the Examiner's findings on "need" (J.A. 460), and the court below affirmed (378 F. 2d 510 at 526).

REASONS FOR DENIAL OF THE WRIT

The Price Line Issue

The Price Line Issue, the initial question presented by the Distributor-Petitioners, challenges the lower court's affirmance of the Commission's findings establishing a 16¢ per Mcf price line as the certificating level for current sales of natural gas from Texas Railroad Commission District No. 4. The Commission fixed the 16¢ per Mcf line for sales under contracts executed *after* September 28, 1960.[4]

Prior to its opinion below in *Turnbull & Zoch Drilling Co., et al.*, Opinion No. 478, the Commission found a 16¢ per Mcf price line for Texas District 4 post-*Policy Statement* contracts, *Amerada Petroleum Corporation*, Opinion No. 422, 31 FPC 623 (1964). On judicial review, the Court of Appeals for the Tenth Circuit affirmed the Commission's findings fixing the 16¢ per Mcf price line, *Sunray DX Oil Company v. Federal Power Commission*, 370 F. 2d 181 (CA10, 1966). Subsequently, these same Distributor-Petitioners sought *certiorari* to review the Tenth Circuit's decision affirming the 16¢ per Mcf line.[5] That petition is pending in *The Brooklyn Union*

[4] The significance of that date lies in the issuance of the Commission's *Statement of General Policy No. 61-1* establishing for the area in question an initial price standard of 18¢ per Mcf. 24 FPC 818, 820 (1960). On August 30, 1962, the Commission amended its *Statement of General Policy* and established a 16¢ per Mcf standard for Texas Railroad Commission District No. 4. 28 FPC 441 (1962).

[5] Their petition also questions the Tenth Circuit's holding that the FPC could not impose retroactive refund obligations.

Gas Company, et al. v. Federal Power Commission, No. 62, this Term[6] The Producer-Respondents in Nos. 61 and 62 opposed the Distributors' petitions on the price line question. Their answers in opposition are hereby adopted in response to the Distributors' Petition in No. 520.

However, independently of the reasoning supporting the 16¢ per Mcf price line in *Amerada*, Opinion No. 422, the record in this case fully supports the Commission's price line determination below.

In their petition, the Distributors contend that in determining the price line for the sales involved the Commission should have restricted itself to evidence relating to sales being made under permanent certificates only. They argue, as a matter of law, that the Commission may not take into consideration unrebutted evidence relating to current sales being made under temporary certificates and equally unrebutted evidence showing the effect that the Commission's *Statement of General Policy* had upon the price line during the time period in question.

During the administrative hearings, both the Staff of the Commission and the producer certificate applicants presented extensive direct testimony and exhibits demonstrating that the price line in Texas Railroad Commission District No. 4 was at least 16¢ per Mcf

[6] The United Gas Improvement Company also petitioned for *certiorari* to review the Tenth Circuit's *Sunray DX* decision; No. 61, this Term.

for the post-*Policy Statement* period (J.A. 371,376). The Distributor-Petitioners did not object to the relevance of that evidence or offer rebuttal evidence to the contrary. They now contend, without record support, that the Commission erred in considering that evidence and the recommendations made by the Staff and the producer witnesses.

In a thorough analysis of the price line exhibits and testimony, the Presiding Examiner found that the few sales which had been permanently certificated during the relevant pricing period "[did] not provide a sufficient number or volume upon which to base an in-line price determination" (J.A. 394). In these circumstances, the Examiner concluded that, in addition to evidence relating to permanently certificated sales, weight had to be accorded the relevant sales under temporary certificates to reflect current conditions. The Commission specifically adopted the Examiner's findings (J.A. 443).

The Distributors' further contention that the Commission may not lawfully consider evidence showing the impact of the Commission's own *Policy Statement* prices is devoid of any merit. Again, the Distributors ignore the record evidence before the Examiner, his findings of fact and the Commission's adoption of those findings. On this point the record shows and the Examiner found that Staff's 16¢ per Mcf price line evidence was offered to determine "what impact the issuance of the Commission's Policy Statement and amendments thereto had on

the patterns of permanently certificated prices in the area" (J.A. 375). Moreover, producer witnesses testified that the Commission's *Policy Statement* directly affected contract prices and that they had relied on the Commission's *Policy Statement* in the conduct of their business (J.A. 376). Thus, the Distributors' claim is reduced to an unsupported assertion that the Commission should not have considered the effect of its own *Policy Statement* prices.

In its price line decision, the Commission applied the rationale of this Court's *CATCO* decision[7] and subsequent interpretations of it. In the first judicial analysis of *CATCO*, the Ninth Circuit held in its *U.G.I.* decision[8] that the price line should reflect current conditions in the industry and, accordingly, must be based upon prices under which a substantial amount of natural gas presently moves in interstate commerce (283 F. 2d at 824). Subsequently, this Court's *Callery* decision[9] also recognized that a price line must be based on prices at which substantial amounts of natural gas are sold (382 U.S. at 227). Similarly, the Court of Appeals for the District of Columbia in its *Skelly* decision[10] noted that the Com-

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[7] *Atlantic Refining Company v. Public Service Commission,* 360 U.S. 378 (1959).

[8] *United Gas Improvement Company v. Federal Power Commission,* 283 F. 2d 817 (CA9, 1960), *cert. den.,* 365 U.S. 879 (1961).

[9] *United Gas Improvement Company v. Callery Properties, Inc.,* 382 U.S. 223 (1965).

[10] *Public Service Commission of New York v. Federal Power Commission,* 329 F. 2d 242 (CADC, 1964), *cert. den.,* 377 U.S. 963 (1964).

mission had given consideration to prices under temporary certificates in fixing the price line there reviewed and affirmed this treatment (329 F. 2d at 245-246).[11] The District of Columbia Circuit further held that the Commission was not free to ignore its own *Policy Statement* in making a price line determination (329 F. 2d at 247).

The question, in essence, is whether substantial evidence supports the 16¢ per Mcf price line finding. The Presiding Examiner, the Commission and the court of appeals below all thought so. Section 19(b) of the Natural Gas Act, 15 U.S.C. 717r(b), provides that, on judicial review, "[t]he finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive." Viewed in this light, the Distributors merely seek this Court's review of a factual determination made by the Commission. See *Illinois Central Railroad Company v. Norfolk and Western Railway Company*, ___U.S.___ (1966), 87 S. ct. 255 at 262, 17 L. ed. 2d 162 at 171.

In their petition, the Distributors claim a conflict between the D. C. Circuit's decision in *Hawkins*[12] and decisions of the Fifth Circuit in *Continental* (below) and The Tenth Circuit in *Sunray DX, supra. Hawkins* involved Commission price line determinations for Texas Railroad

[11] This, of course, was consistent with the Commission's prior holdings in other price line cases that sales under temporary certificates could not be ignored, *Texaco Seaboard, Inc.*, 29 FPC 593 at 597 (1963); *The Ohio Oil Company*, 27 FPC 551 at 553 (1962), *aff'd, Atlantic Refining Company v. Federal Power Commission*, 316 F. 2d 677 (CADC, 1963).

[12] *Public Service Commission of New York v. Federal Power Commission*, 373 F. 2d 816 (CADC, 1967).

Commission District Nos. 2 and 3[13] *Sunray DX* and the *Continental* decision below both involved price line determinations for Texas Railroad Commission District No. 4. Each of these three cases involved separate hearings on different records with necessarily different findings of fact and separate opinions. This is a natural result of the Commission's historical treatment of each of the three Railroad Commission Districts on the Texas Gulf Coast as a separate and distinct geographical area for in-line pricing purposes. Consistently, the Commission's *Statement of General Policy No. 61-1* shows the separate delineation of these three pricing areas (24 FPC at 820).

The Distributors ignore the difference in price line areas involved, as well as the D. C. Circuit's own decision in *Hawkins* where it particularized the factual distinction between the case then before it and the case before the Tenth Circuit in *Sunray DX*, as follows:

> "... the Tenth Circuit was faced with a problem very different from ours. There only 1.39% of the gas sold in the area was permanently certificated.... In our case, there is a substantial volume moving under permanent certificates." (373 F. 2d at 828)

In this case, as the Commission found, the "permanently certificated sales do not provide a sufficient number or volume upon which to base an in-line price determina-

[13] Before the commission, the sales from Texas Railroad Commission District No. 2 were heard on a separate record from sales originating in Texas Railroad Commission District No. 3. However, the Court of Appeals wrote one opinion covering sales from these two districts. See Note 12, above.

tion" (J.A. 394). In these circumstances, the judgment of the court below, affirming the Commission's price line determination for Texas Railroad Commission District No. 4, is clearly distinguishable from the Texas Railroad Commission District Nos. 2 and 3 *Hawkins* case decided by the District of Columbia Circuit. There is no conflict of circuits on this issue.

For all of the above reasons, the Distributors' request for *certiorari* on the price line question should be denied.

The "Need" Issue

The court below affirmed the decision of the Commission which, *inter alia,* held that the pipeline-purchasers' need for gas had been determined in prior hearings and therefore was not the proper subject for a reappraisal in these producer certificate proceedings (J.A. 366). Under the facts presented, this holding is clearly correct. As discussed hereafter, a *particular* pipeline's need for gas supplies is a basic issue which has always been considered by the Commission in pipeline certificate proceedings. With respect to the instant sales, each of the pipeline-purchasers had received all certificate authorization required to receive, transport, and resell the gas sold them by Respondents (J.A. 365, n. 15; 366). In these circumstances, the Commission's previous findings in those pipeline certificate cases established the existence of the pipeline's need for the gas proposed to be sold by the producer certificate applicants.

Had the Petitioners come forward with any evidence purporting to show that the Commission's prior findings were no longer valid or why the pipeline-purchasers no longer needed this gas, then a legitimate issue might have been raised to which affirmative evidence could have been specifically directed. However, Petitioners did not tender any evidence on this question in the administrative proceedings below, but simply maintain that the producer certificate applicants should have presented evidence on this previously resolved point.[14] (J.A. 446).

Paradoxically, Petitioners' concern with "need" arises only when a producer's certificate issues at a price exceeding 15¢ per Mcf (J.A. 446). Seemingly, the "need" by the very same pipeline-purchaser for the very same gas at a price of 15¢ per Mcf, or less, would not have been challenged. It thus appears that the Petitioners' "need" issue is merely a restatement of their position on the price line issue, which they raise in Question No. (1) of their Petition.

That no *bona fide* "need" issue exists in this proceeding is further confirmed by the Petitioners' failure to limit their complaints to producer sales to pipeline companies serving the ultimate consumers in the States of Pennsylvania and New York which Petitioners purport to represent. Petitioners can scarcely be aggrieved by the decision below insofar as it relates to the several sales to Natural Gas Pipeline Company of America, whose transmission facili-

[14] With striking inconsistency, however, Petitioners *supported* the Presiding Examiner's exclusion of the producers' proffered evidence which bore upon the question of public need (J.A. 361-364).

ties terminate in the vicinity of Chicago, Illinois, and serve the Middle-Western "public need" in Illinois and adjacent states. *Wisconsin v. Federal Power Commission,* 373 U.S. 294, 304 (1963). Nor, for the same reason, can Petitioners be aggrieved by sales to Florida Gas Transmission Company, which serves the "public need" in Florida and other Southeastern states. Significantly, the regulatory agencies and the distribution companies of the states directly concerned have raised no "need" issue with respect to these sales.

The Commission's correlative action in considering "need" issues in pipeline certificate cases,[15] ultimately raised by these Petitioners, conforms with its consistent administration of Section 7 of the Natural Gas Act. The administrative decision in the instant case reflects a well-established Commission policy calculated to assure due consideration of an *individual* pipeline's market requirements and data at the time and in the particular proceed-

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[15] The Commission, however, separately considered one aspect of the general subject of "need," the matter of so-called "take or pay" contract provisions between producers and pipelines, in general rulemaking proceedings recently concluded in Docket No. R-199. These rulemaking proceedings were duly noted and upheld as within the permissible ambit of Commission discretion by the court below (378 F. 2d 510 at 526). It should be observed that the certificates here involved were, by express condition, subject to the outcome of the rulemaking proceeding in Docket No. R-199 (J.A. 459). The Commission's orders issued January 18, 1967, and March 21, 1967, in the latter docket effectively moot the "take or pay" aspect of the "need" question raised by Petitioners. See Order No. 334, issued January 18, 1967, and Order No. 334-A, issued March 21, 1967, in Docket No. R-199. Order No. 334 is embodied in Sections 154.103 and 157.25 of the Commission's Regulations under the Natural Gas Act; 18 CFR 154.103, 157.25.

ing where such market evidence is most readily available and can most feasibly be presented. Thus, beginning in the early days of the Natural Gas Act, the Commission held that a showing of customers in the territory sought to be served constituted an essential part of the pipeline's case and that proof of market, supported by an adequate gas supply, must be shown in the pipeline certificate proceeding. *Kansas Pipe Line & Gas Company, et al.*, 2 FPC 29, 45-46 (1939).

This same established policy is fully recognized and implemented in the Commission's Regulations Under the Natural Gas Act which require the pipeline certificate applicant to furnish detailed gas supply and demand data in its certificate application.[16]

From the practical standpoint, it would be extremely unwieldy and awkward, if indeed possible at all, for a *producer* to prove a particular *pipeline's* need in a *producer* certificate proceeding. Such practical objections—and the consequent heavy burden upon the producer if it had to attempt such proof—have also received the attention and recognition of the Commission. Thus, but five years after the advent of producer regulation, it was held[17]

[16] See 18 CFR 157.14(a), including subsection (11) which requires, *inter alia*, a showing of the names and locations of the pipeline's customers, the number of such customers in each of several categories, the pipeline's peak day gas requirements for each category, the explanation of factors used in estimating the pipeline's future gas requirements, and copies of market surveys obtained by the pipeline-applicant during the preceding three years.

[17] *J. M. Huber Corp*, Docket No. G-13800, order issued August 10, 1959 (unreported). See also *Hope Natural Gas Co.*, 19 FPC 405, 407 (1958).

by the Commission that "... to require a showing of the pipeline purchaser's need for gas in its broadest aspects would impose a difficult, if not impossible, burden on the producer applicant" and that "... the requirement of a broad showing of market need would impede the Commission in promptly disposing of such applications."

Experience in the administration of the Act has shown that the pipeline certificate proceeding is the most appropriate place to ascertain a pipeline's market requirements. The data from customer-distributing companies is readily available to the pipeline which continually serves them, deals with them, and gears its operations to the satisfaction of their needs. Indeed, because of this close relationship between the pipeline and its customers, the pipeline is ordinarily the only party in a real position to know and to demonstrate its need for gas. Respecting the producer, if he has a contract with the pipeline for the sale of his gas, he has palpably shown the proof of *his* market, subject, however, to the certification of his pipeline-purchaser (J.A. 364-365); there is plainly no policy or other reason to require the *producer* to adduce further, duplicative data bearing upon the *pipeline's* needs, which the pipeline itself must in any case gather and supply in its own separate certificate proceeding.[18]

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[18] On occasion, the Commission has consolidated producer certificate applications with the related pipeline certificate proceeding for hearing and disposition. [See *e.g., Transcontinental Gas Pipe Line Corporation, et al.,* 20 FPC 264 (1958)]. However, such consolidated proceedings have proved administratively infeasible and, accordingly, the Commission

(Continued on Page 16)

See *Kansas Pipe Line & Gas Company*, cited *supra*, and Section 157.14(a) of the Commission's Regulations Under the Natural Gas Act [18 CFR 157.14(a)].

The Petitioners are essentially attacking the Commission's practical administration of the Natural Gas Act which has developed over a period of many years. In so doing, they seek to reopen for reappraisal prior Commission findings and orders granting certificates to the pipeline-purchasers. They seek to do so, moreover, without tendering any evidence to explain the "reasons why." In this regard, it is clear that the Petitioners should have presented their "need" arguments in the appropriate proceeding where the market requirements were under review; the Petitioners should have pursued their remedies there, by way of rehearing and appeal. The "need" arguments presented here are concluded and foreclosed by the final pipeline certificates—the Petitioners may not now retry the same question again. *Union Electric Co. v. Federal Power Commission*, 326 F. 2d 535, 541 (CA8, 1964), reversed on other grounds, 381 U.S. 90 (1965); *Pan American Petroleum Corporation v. Federal Power Commission*, 268 F. 2d 827, 830 (CA10, 1959).

The governing authorities, in sum, compel the conclusion that the decision below regarding "need" is clearly correct.

Note 18 (Continued)

has in recent years adopted the practice of hearing pipeline cases separately, while consolidating (as in the instant case) all pending producer sales in a definite pricing area.

CONCLUSION

The Petition for Writ of Certiorari in No. 520 should be denied.

Respectfully submitted,

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